No. 10,220

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

District Court No. 20,473-S

MOUNT TIVY WINERY, INC. (a corporation), *Appellant,*

vs.

JOHN V. LEWIS, Collector of Internal Revenue, First California District, and UNITED STATES OF AMERICA, *Appellees.*

District Court No. 20,464-R

CALIFORNIA WINERIES AND DISTILLERIES, INC. (a corporation), *Appellant,*

vs.

JOHN V. LEWIS, Collector of Internal Revenue, First California District, and UNITED STATES OF AMERICA, *Appellees.*

District Court No. 20,465-L

FRESNO WINERY, INC. (a corporation), etc., *Appellant,*

vs.

JOHN V. LEWIS, Collector of Internal Revenue, et al., *Appellees.*

District Court No. 20,466-R

SANTA LUCIA WINERIES, INC., (a corporation), *Appellant,*

vs.

JOHN V. LEWIS, Collector of Internal Revenue, et al., *Appellees.*

District Court No. 20,467-S

CHARLES DUBBS and SAMUEL CAPLAN, Co-partners doing business as ALTA WINERY AND DISTILLERY, *Appellants,*

vs.

JOHN V. LEWIS, Collector of Internal Revenue, et al., *Appellees.*

District Court No. 20,474-W

CALIFORNIA GROWERS WINERIES, INC. (a corporation), *Appellant,*

vs.

JOHN V. LEWIS, Collector of Internal Revenue, et al., *Appellees.*

District Court No. 21,113-L

ST. GEORGE WINERY (a corporation), *Appellant,*

vs.

JOHN V. LEWIS, Collector of Internal Revenue, et al., *Appellees.*

APPELLANTS' OPENING BRIEF.

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APPELLANTS' OPENING BRIEF.

STATEMENT REGARDING JURISDICTION.

These appeals arise from judgments entered by the District Court of the United States for the Northern District of California, Southern Division. The opinion by Judge St. Sure, which is similar to the opinions in each of the seven cases, except for amounts involved and jurisdiction over the defendant United States of America, is set forth on pages 37 to 47 of the transcript of record herein.

The joint appeal in these cases involves tax returns made by each of the appellants in 1934, pursuant to demands by defendant John V. Lewis, then Collector of Internal Revenue, and payments made thereafter of the taxes assessed thereunder, as provided in the Liquor Taxing Act of 1934, 26 U. S. C. A. 451 (b), 1934 Cumulative Annual Pocket Part, particularly Section 10 (c) thereof.

The seven appeals herein are taken jointly from the several judgments entered after trial below, pursuant to stipulation and order of the District Court consolidating said cases for trial in the District Court, in accordance with Rule 75 (k) Title 28, Rules of Procedure for the District Court of the United States, entered on April 3, 1942 (R. 85-90).

A stipulation and order consolidating these cases on appeal, etc., dated July 2, 1942, was filed July 3, 1942 (R. 94), as authorized under Rules 74 and 75 of the Federal Court Rules, Title 28, United States Code, pages 2652-3-4.

The notices of appeal were filed on July 3, 1942, pursuant to the provisions of Section 230, Title 28,

United States Code (Title 28, Section 230, U. S. C. A.) and Rule 73 Federal Court Rules, District Court of the United States, Title 28, United States Code, page 2651 and a cost bond on appeal was filed on the same date (R. 103-106).

The designation of record on appeal was filed July 3, 1942 (R. 99-100), and a stipulation transmitting original exhibits and order approving same dated July 10, 1942, was filed on said latter date.

The District Court took jurisdiction of the proceedings in all seven cases under the provisions of Section 41, subdivision 5, Title 28, United States Code, against defendant John V. Lewis, a former Collector of Internal Revenue and against the United States of America under the provisions of subdivision 20, Section 41, Title 28, United States Code.

The appellants paid to appellee, John V. Lewis, in his official capacity as Collector of Internal Revenue, the floor tax, interest and penalties in question in each case, at the time and in the respective amounts set forth in the respective stipulation of facts filed in each of these cases pending in the District Court of the United States, and, thereafter, each appellee filed a claim for refund in the manner and form provided by law, which respective claims for refund were formally rejected thereafter, as is set forth in said stipulations of fact, by letter from the Commissioner of Internal Revenue. Each of the instant actions was commenced within the statutory period of time against defendant John V. Lewis, Collector of Internal Revenue and was commenced within the statutory period

of time in cases No. 20,464-R, No. 20,474-W and No. 21,113-L (R. 43-90), in which appellants, California Wineries and Distilleries, Inc., a California corporation, California Growers Wineries, Inc., a California corporation, and St. George Winery, a California corporation, respectively, were plaintiffs.

This Court has jurisdiction to review by appeal the final decision of the District Court, under Section 225 (a), Title 28, United States Code (Section 128 (a), Judicial Code).

STATEMENT OF THE CASE.

The Issue.

The question involved, in each of these seven cases, is whether appellants herein were subject to the floor tax imposed by Section 10 (c) of the Liquor Taxing Act of 1934, 26 U. S. C. A. 451 (b), 1934 Cumulative Annual Pocket Part, provided as follows:

> "Upon all wines *held* by the producer thereof upon January 12, 1934, *and intended for sale or for use in the manufacture or production of any article intended for sale,*[1] there shall be levied, assessed, collected and paid a floor tax equal to the amount, if any, by which the tax provided for under Section 443 of this title exceeds the tax paid upon the grape brandy or wine spirits used in the fortification of such wine."

The liability of appellants and each of them respectively, to the tax depends upon: (a) whether each ap-

[1]Italics supplied throughout by appellant.

pellant "held" the wines upon which the floor tax was imposed on January 12, 1934; (b) whether such wines were "held" by each appellant as a producer on said date; (c) whether such wines, if so "held" by each appellant as a producer were "intended for sale or for use in the manufacture or production of any article intended for sale"; and, (d) whether, if such wines were so "held" by each appellant, for any of said purposes enumerated, the tax, interest and penalty assessed and collected from each of the appellants was illegally imposed and collected on the grounds that the above Section 10 (c) of the Liquor Taxing Law of 1934, violates, (1) Article I, Section 2, Clause 3, (2) Article I, Section 9, Clause 4, and, (3) The Fifth Amendment to and of the Constitution of the United States, in that Section 10 (c) levies a direct tax without proper apportionment and imposes a tax upon one class of persons only, thereby depriving such class of the "equal protection of the law", under the due process clause.

Appellants, in each of the seven cases, made application for refund of the taxes paid, which applications were denied. In most of the cases, plaintiffs paid the taxes assessed under protest, after claims for abatement of the respective taxes were denied.

Appellants, in their respective complaints, claimed non-liability for the floor tax assessed and the tax, interest and penalty collected on the grounds:

That the tax, interest and penalty was illegally imposed and collected because:

(a) The wines, upon which the tax was imposed and the tax, interest and penalty collected, were not "held" legally or physically by appellants on the taxable date, namely, July 12, 1934;

(b) nor were said wines "held" by appellants as a producer, or at all, on the taxable date;

(c) nor were such wines so "held" by appellants as such producer and intended for sale or for use in the manufacture or production of any article intended for sale by appellants; and,

(d) Should it be found that appellants "held" the wines under (a), (b), or (c), that nevertheless the floor tax was illegally assessed and the tax, interest and penalty illegally collected from appellants because Section 10 (c) of the Liquor Taxing Act of 1934 is illegal and void, because it is a violation of: (1) Article I, Section 2, Clause 3; (2) Article I, Section 9, Clause 4; and, (3) The Fifth Amendment to and of the Constitution of the United States; in that said Section 10 (c) levies a direct tax without proper apportionment and imposes a tax upon one class of persons, thereby depriving such class of the "equal protection of the law" under the due process clause.

Concerning the argument that said law imposed a tax upon one class of persons, the District Court held that this ground could not be raised for the first time in argument without being properly pleaded.

Each complaint filed in the District Court contains two counts, in which the points raised in Paragraphs (a), (b), (c), and (d) above are set forth. In this

connection the District Court states in its opinion that: *"The first states a claim for recovery, if justified by the law and the evidence.* The second adopts the allegations of the first, by reference, and adds that Section 10 (c) of the Liquor Taxing Act of 1934, under the provisions of which the taxes were assessed and collected, violates Article I, Section 2, clause 3, and Article I, Section 9, clause 4 of the Constitution of the United States of America."

The Court below concluded (R. 47) "that the liquor in question was *'held'* by plaintiff within the meaning of Section 10 (c) on the effective date thereof", after first concluding (R. 43) that, in three of the companion cases, namely, No. 20,464-R, No. 20,474-W, and No. 21,113-L, service, as required by the Tucker Act, 28 U. S. C. A. §763, was made within the two year period specified in 26 U. S. C. A. Int. Rev. Code, §3773 (a) (2), so that in those cases the Court had jurisdiction of the United States, as well as the Collector of Internal Revenue over whom the Court had jurisdiction in all seven cases; also (R. 43), that the tax levied by Section 10 (c) is an excise tax, and as such, constitutional.

STATEMENT OF THE FACTS.

All of the cases below were submitted upon the basis of an agreed statement of facts in each case (R. 14).

Except for differences in the amount of the taxes, interest and penalties paid, and the location of the

bonded warehouses, a different corporate warehouseman and bank (hereinafter referred to as Warehouse Corporation or Bank, respectively, irrespective of the actual name of the warehouseman corporation or Bank), the facts in each of the cases are substantially the same.

Although the verbiage and figures used in the various notes, warehouse receipts, leases and agreements vary, such variance however, is not material, because only issues of law, applicable to all seven cases alike, are raised, upon the determination of which any judgment herein must be predicated.

These facts are set forth in a written stipulation and a supplemental stipulation of facts in the exhibits thereto attached (R. 14-36). The findings of fact by the Court below (R. 48-81) follow in general the written stipulations.

The conclusions of law (R. 82-84) set forth in Paragraphs I, II and III (R. 82) are the same substantially in all cases, except that in cases No. 20,564-R, No. 20,474-W and No. 21,113-L, the Court arrived at the opposite conclusion, to the effect that the actions were properly commenced against the United States of America within the statutory period of time, and that therein the Court had jurisdiction of said defendant United States of America. In all other particulars, with the exception of verbiage, figures, et cetera, the conclusions of law, insofar as material to these appeals, are similar.

Appellants, in each of the seven respective cases, oppose the conclusions of law set forth in Paragraphs

V to XV inclusive (R. 82-84), because appellants contend that they are contrary to the facts, as stipulated in the within stipulations of fact (R. 14-36), and the law and constitutional provisions noted.

The facts so stipulated may be summarized as follows: Appellants, with the exception that one appellant is a co-partnership, are corporations (R. 14-15, 49), duly organized and existing as such prior to January 12, 1934. Appellants were qualified to and were engaged in the manufacture, production and sale of wine intended for sale or for use in the manufacture or production of articles intended for sale in their respective bonded wineries, all being located within the Northern Division of the Southern District of California (R. 15, 49).

Defendant John V. Lewis was a resident of said Division and District, and was the duly appointed, qualified and acting Collector of Internal Revenue therein at the time of the assessment and collection of the taxes, but resigned, as such, prior to the filing of the respective complaints (R. 15, 49).

The respective actions were brought against Lewis as a former Collector of Internal Revenue, and the United States of America (R. 15, 49), as noted in the statement regarding jurisdiction (ante).

Prior to the enactment, on January 11, 1934, of Section 10 (c) of the Liquor Taxing Act of 1934, and the date on which said Act became effective and operative on January 12, 1934, (R. 19, 59),

I. The Warehouse Corporation.

A. Was duly organized and existing as a corporation;

B. Owned and operated a public warehouse business on the premises of each respective appellant under a written Field Warehouse Storage Agreement (Exhibit "G") and a Field Warehouse Lease (Exhibit "H"; R. 35), under the authority and pursuant to the laws of the State of California and Treasury Decision 19 and General Circular No. 141, approved September 16, 1933 (Exhibit "A"; R. 16, 51);

C. Had made application for a permit to the Supervisor of Permits, Bureau of Industrial Alcohol, under the laws and regulations governing the establishment of bonded wineries and storerooms, to establish a Public Bonded Storeroom (Exhibit "B"; R. 16, 51);

D. Obtained a permit (Exhibit "C") to establish said Public Bonded Storeroom or Warehouse (R. 16, 58);

E. Executed to the United States of America a blanket bond in the sum of $100,000.00 on Form 1530A (Exhibit "E"; R. 16);

F. Thereafter was obliged to and did render monthly reports (Exhibit "F") to said defendant, accounting for all wines received, stored and removed from the bonded storeroom premises (R. 16-17);

G. Entered into, with each respective appellant, (a) A Field Warehouse Storage Agreement (R. 17,

59; Exhibit "G"), and, (b) a Field Warehouse Lease (Exhibit "H"; R. 19, 59);

H. Had issued, as such public warehouseman, under the laws of the State of California, the United States of America, and the rules and regulations of the Treasury Department, including T.D. No. 19 (Exhibit "A"; R. 27), pursuant to the request of each appellant (R. 20), warehouse receipts, negotiable in form, to the Bank or order, which receipts were issued and executed in the name of and were delivered, at the request of each appellant, on said dates, to said Bank, in accordance with and pursuant to the authority contained in the Articles of Incorporation and By-Laws of the warehouse corporation and the laws of the State of California (R. 20, 59-60);

I. Had released, subsequently, various quantities of the wine stored in its Public Bonded Storeroom to purchasers of the wine and their authorized agents at the request of said Bank, which Bank executed and delivered to the Warehouse Corporation an Order for Warehouse Release (Exhibit "N"; R. 21-71);

J. Had received from the Bank the Warehouse Receipt, negotiable in form, previously issued in the name and to the order of the Bank, for cancellation, or for endorsement thereon of the amount of the wine sold, or for issuance of a new warehouse receipt, negotiable in form, in the name of and to the order of the Bank, which endorsed or new warehouse receipts were thereafter returned to the Bank by the Warehouse Corporation (R. 26);

K. Had physical possession and control of all wines, following receipt thereof from appellants, at all times in its Public Bonded Warehouse until sold by the Bank and delivered by it pursuant to an Order for Warehouse Release to purchasers (R. 27, 64); and

L. Placed all wine, so delivered to it, in storage tanks located in and upon the leased premises; that signs were placed over and outside the entrances and inside the leased premises to the effect that said leased premises was the registered Public Bonded Storeroom of the Warehouse Corporation; that upon receipt of the wine from each appellant said Warehouse Corporation caused to be placed upon the tanks in which the wine was stored, stock cards showing that the wine was warehoused to said Bank, the description of the wine, the date of warehousing, the negotiable warehouse receipt number issued against the wine, and the quantity and quality of the wine therein stored; that locks were placed upon all entrances to the leased premises by the Warehouse Corporation and the key to each of said locks was in the possession of and was retained by the agent of the Warehouse Corporation in charge of the leased premises; that at all times the Warehouse Corporation caused to be employed its bonded agent to whom detailed printed instructions were given as to his duties; that the salary of said bonded agent was paid by the Warehouse Corporation; that no appellant was permitted access to the leased premises except through the bonded agent of the Warehouse Corporation in accordance with the terms of said written agreement herein

referred to, and then only under the observation and supervision of the bonded agent of the Warehouse Corporation; that the warehouse was opened and closed by the bonded agent who kept it locked at all times that he was not personally there, and said bonded agent received and delivered all merchandise at the leased premises.

That in accordance with the provisions of the Field Warehouse Storage Agreement, Exhibit "G", and in accordance with an understanding between each appellant and the Warehouse Corporation pursuant thereto, each appellant was, from time to time, permitted to have access to the said bonded storeroom for the purpose of servicing and caring for said wine during the period said wine was stored in said bonded storeroom (R. 27-29, 63-64);

II. The Bank had,

A. Received from appellant several promissory notes prepared by the Bank and executed to the order of the Bank by appellant, and thereafter, the collateral agreement (Exhibit "M1"), executed to the Bank by appellant (see Paragraph III, F. post);

B. Received from the Warehouse Corporation many of the warehouse receipts, negotiable in form, issued in the name and to the order of the Bank (see Paragraph I, H. ante), prior to the execution of the collateral agreement (Exhibit "M1"), and thereafter some of the original and some of the endorsed warehouse receipts;

C. Delivered to the Warehouse Corporation Orders for Warehouse Release of wine stored (see Paragraph I, I. ante), and redelivered Warehouse receipts, negotiable in form, previously delivered to the Bank by the Warehouse Corporation for endorsement thereon of sales and withdrawals of wine, cancellation thereof, or for reissuance and delivery to the Bank of new warehouse receipts, negotiable in form, in the name and to the order of the Bank (see Paragraph I, J. ante);

III. Each appellant had,

A. Entered into a Field Warehouse Storage Agreement (Exhibit "G"; R. 17-59) with the Warehouse Corporation, in writing, wherein, among other things, the Warehouse Corporation agreed to furnish appellant all field warehouse services necessary to appellant's business (R. 49-50), and appellant agreed to employ said Warehouse Corporation to furnish such services, subject to the terms and conditions and for the consideration therein set forth (R. 50); wherein the Warehouse Corporation (R. 7-18, 50) agreed:

1. To maintain a public warehouse in and upon the premises leased by the appellant to the corporation;

2. To furnish to the appellant all field warehouse services necessary to the appellant's business;

3. To place a bonded agent and/or bonded watchman in charge of the warehouse and leased premises; and,

4. To issue field warehouse receipts upon the property which the appellant might store therein; the agreement also provided, however, (a) that the Warehouse Corporation should be free from all liability for taxes, assessments, charges or penalties levied, assessed or imposed by a Federal, State, County or Municipal Government or by any other quasi-public or governmental agency upon or in respect of the wines warehoused under the terms of the agreement; (b) that the appellant agreed to render all reports required of the plaintiff or the corporation or of either of them in respect to the commodities warehoused by any and all governmental agencies; and (c) that at the option of the Warehouse Corporation it could pay all taxes, assessments, charges or penalties and could service, blend, fortify, rectify, handle and care for the warehoused wines and could render all reports at the expense of the appellant in the event the appellant failed to do so as agreed in the agreement;

B. Entered into a Field Warehouse Lease with Warehouse Corporation (Exhibit "H"; R. 19, 51) pursuant to the agreement contained in said Field Warehouse Storage Agreement (Exhibit "G"), and delivered the leased premises, adjacent to premises occupied by appellant, to the Warehouse Corporation, which corporation thereafter had sole and exclusive possession and control thereof (R. 19, 58);

C. Manufactured, fortified and removed to and stored in said Public Bonded Storeroom or Warehouse

all wines upon which the instant taxes were assessed and the interest and penalties paid thereon (R. 20, 59-60);

D. Serviced and cared for said wine, prepared and filed all returns required and paid all taxes (R. 29, 73) assessed upon the wine stored, as agreed with the Warehouse Corporation pursuant to and in accordance with the Warehouse Storage Agreement (Exhibit "G");

E. Requested the Warehouse Corporation, prior to the execution of said Collateral Agreement with the Bank (Exhibit "M1"), to issue Wine Warehouse Receipts, negotiable in form, to the Bank, or order, covering all of the above wine (R. 20, 59-60), some of which receipts,[2] negotiable in form, were issued and executed by the Warehouse Corporation prior to the execution of the Collateral Agreement by appellant with the Bank and the remainder thereafter, all in the name of and all of which receipts were delivered at the request of appellant to the Bank by the Warehouse Corporation (R. 20-21, 59-60); and,

F. Executed several promissory notes (for Form, see Exhibit "M") prepared by the Bank at the request and to the order of the Bank (R. 20-21); and thereafter, and prior to January 12, 1934, entered into a collateral agreement (for Form, see R. 64-70) with the Bank (R. 21, Exhibit "M1").

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[2]All warehouse receipts issued were similar in form, with the exception of number, date, wine described therein and name of the Bank or Warehouse Corporation named therein (For form, see R. 60-62).

Subsequent to January 12, 1934 and the enactment of Section 10 (c) of the Liquor Taxing Act of 1934, appellant, pursuant to (R. 29-30) (a) A & C Mimeo. Coll. No. 4132 (Exhibit "O"), (b) Mimeo. Letter "Floor Tax on Distilled Spirits, Wines, etc." (Exhibit "P"), and in the belief that appellant was legally required,[3] to do so, returned to defendant John V. Lewis an Inventory and Return on Form 756 (Exhibit "Q"), prepared and supplied by said defendant to appellant, showing a specific number of gallons of wine, containing a specified number of proof gallons of brandy on hand, upon which a tax was believed to be due in the amount stated (R. 29-30, 77).

Thereafter appellant paid (for Form of Receipt, see Exhibit "U") to said defendant John V. Lewis, as such Collector of Internal Revenue, the aggregate amount of the taxes assessed (R. 33) against appellant, and in addition the interest and penalties therein set forth in each action in the District Court (R. 30, 33, 80-81), pursuant to Notice and Demand (Exhibit "V") from said defendant therefor, and following assessment thereof, and after a protest (Exhibit "R") and a claim for abatement (for Form see Exhibits "S" and "T") of the tax had been denied (R. 31-32, 80-81).

A claim for the refund of the taxes, interest and penalties so paid to said defendant was filed there-

[3]See Exhibit "G", Field Warehouse Storage Agreement, wherein appellant contracted and agreed with the Warehouse Corporation to file all returns and pay all taxes assessed against the wine stored in the premises leased to the Warehouse Corporation.

after, which claim for refund was denied (R. 33, 81), whereupon the instant action was instituted to recover the taxes, interest and penalties so paid as aforesaid.

SPECIFICATION OF ERRORS.

The errors relied upon in this appeal are those set forth in the statement of points (R. 109-111) as follows:

1. Since all the evidence was contained in stipulations of fact, and there was no controversy as to the facts, in each of the respective cases consolidated in this appeal, only a question of law was presented to the trial Court.

2. The trial Court erred as a matter of law in holding that Section 10 (c) of the Liquor Taxing Act of 1934 levies an excise tax.

3. The trial Court erred as a matter of law in holding that Section 10 (c) of the Liquor Taxing Act of 1934 does not violate Article I, Section 2, Clause 3, and Article I, Section 9, Clause 4 of the United States Constitution.

4. The trial Court erred as a matter of law in holding that Section 10 (c) of the Liquor Taxing Act of 1934 does not violate the Fifth Amendment to the Constitution of the United States.

5. The trial Court erred as a matter of law in holding that within the meaning of Section 10 (c) of the Liquor Taxing Act of 1934, 26 U. S. C. A. 451 (b),

1934 Cumulative Annual Pocket Part, the appellants held the specified quantities of wine set forth in the findings of fact, conclusions of law and respective judgments in each of the cases herein consolidated and appealed.

6. The trial Court erred as a matter of law in holding that the appellants intended to sell the wine so stored in bonded storerooms or use it in the manufacture or production of articles intended for sale.

7. The trial Court erred as a matter of law in holding that appellants and each of them, was subject to the provisions of said Liquor Taxing Act and was liable for an Internal Revenue Tax in the amount set forth in the findings of fact, conclusions of law and judgments entered in the respective cases before the United States District Court, herein consolidated and appealed.

8. The trial Court erred as a matter of law in holding that appellants and each of them was subject to and liable for the respective sums set forth in the findings of fact, conclusions of law and judgments in interest on the unpaid Internal Revenue taxes under the provisions of Section 10 (c) of the Liquor Taxing Act of 1934, U. S. C. A. 451 (b), 1934 Cumulative Annual Pocket Part.

9. The trial Court erred as a matter of law in holding that the respective sums of principal and interest set forth in the findings of fact, conclusions of law and judgments entered in each of the respective cases before the District Court of Appeals and con-

solidated in this case on appeal was rightfully and correctly paid and that appellants and each of them was not entitled to its return or any portion thereof.

10. The trial Court erred as a matter of law in holding that appellees John V. Lewis and the United States of America were entitled to a judgment of dismissal and for costs of suit incurred in said action.

As Specification of Errors numbered 2, 3 and 4 involve the same fundamental issues, as is true of Specification of Errors numbered 5 and 6, Errors 2, 3 and 4 will be discussed together and not separately, as will Errors 5 and 6, in the argument herein.

Likewise, as Specification of Errors numbered 7 to 10, inclusive, involve a determination, favorable to appellant, of one or more of Specification of Errors numbered 1 to 6, inclusive, the arguments applicable to Specification of Errors numbered 7 to 10, inclusive, will be considered in the argument relative to Specification of Errors numbered 1 to 6, inclusive, and not separately.

SUMMARY OF ARGUMENT.

I. Since all the facts were stipulated below and there was no controversy on the facts, the District Court had before it only questions of law. Likewise, only questions of law are before this Court.

II. The wines, upon which the taxes were assessed, levied and collected, were not "held" by any of the appellants herein on the taxable date, within the

meaning of Section 10 (c) of the Liquor Taxing Act of 1934, or at all, on January 12, 1934, the effective date of the Tax Act **(Specification of errors 5 to 10 inclusive).**

III. Even if appellants "held" the wines, upon which the taxes were assessed, levied and collected, within the meaning of Section 10 (c) of the Liquor Taxing Act of 1934, on the effective date of said Tax Act, the assessment, levy and collection of the taxes thereon was a violation of certain provisions of the Constitution of the United States in that Section 10 (c) of said Liquor Taxing Act of 1934:

(a) Imposed a direct, rather than an excise tax, without proper apportionment among the several states according to population; and,

(b) Imposed a tax upon one class of persons only without equal protection of the laws **(Specification of errors 2, 3, 4, 7, 8, 9 and 10).**

Consequently, as the wines were not "held" by appellants, as aforesaid, or, even if so "held" by appellants, within the meaning of Section 10 (c) collection of the taxes, interest and penalties from appellants was illegal and void on the constitutional grounds set forth.

ARGUMENT.

I.

ONLY A QUESTION OF LAW WAS PRESENTED TO THE COURT BELOW.

As shown by the record, the only evidence before the trial Court was written stipulations of facts, there being no oral testimony. Accordingly, there was no controversy as to the facts, and the Court had before it only questions of law.

The District Court for the Southern District of New York, in *General Ribbon Mills, Inc. v. Higgins,* 32 Fed. Supp. 534, 537, said:

> "Each case must be decided on its own state of facts. The facts being admitted whether they constitute 'carrying on or doing business' is a question of law."

Likewise, this appeal presents only a question of law, free of confusion as to the facts. Whether appellants "held" the wine, upon which the taxes were imposed and collected, is a question of law for this Court to determine.

In a comparable situation, Mr. Justice Frankfurter said.

> "What the activities of a taxpayer are is an issue for determination by triers of fact. Whether such activities constitute a 'trade or business' as conceived by Section 23 (a) of the Revenue Act of 1928, is open for determination here unfettered by findings and rulings below except for the weight of the intrinsic authority of all lower court opinions."
>
> *Deputy v. Du Pont,* 308 U. S. 488, 499.

In approaching this question, appellants respectfully submit that the benefit of any reasonable doubt should be given to them. Appellants' contention is not based upon any "exemption" provision of the law, but rather, on the one hand, that the law as passed by Congress does not include appellants within its scope. It is a familiar rule that tax laws are to be liberally construed in favor of taxpayers.

Burnet v. Niagara Falls Brewing Co., 282 U. S. 648, 654.

See also, *Miller v. Standard Nut Margarine Co.,* 284 U. S. 498, 508, where the Court said in part:

> "It is elementary that tax laws are to be interpreted liberally in favor of taxpayers and that words defining things to be taxed may not be extended beyond their clear import. *Doubts must be resolved against the Government and in favor of the taxpayers".*

Moreover, revenue and tax statutes must be construed strictly.

U. S. v. Wigglesworth, 2 Story (U. S.) 369, 373;
Rice v. U. S., 53 Fed. 910;
Powers v. Barney, 5 Blatchf. (U. S.) 202, 203;
U. S. v. Watts, 1 Bond (U. S.) 580, 583;
U. S. v. Freed, 255 U. S. 257, 68 L. ed. 617;
Gould v. Gould, 245 U. S. 151;
Ebersole v. McGrath, 271 Fed. 995.

Nor are the provisions of laws imposing taxes to be extended by implication, which rule of law the District Court failed to follow in the instant matter.

Gould v. Gould, ante;
U. S. v. Field, 255 U. S. 257.

Where the language of a tax statute is ambiguous the Court adopts the construction which is most favorable to the taxpayer. Also, if there is any doubt as to the connotation of a term and another meaning might be adopted, the fact of its use in a tax statute would incline the scale to the consruction most favorable to the taxpayer.

Gould v. Gould, ante.
United States v. Merriam, 263 U. S. 179;
Old Colony R. Co. v. Commissioner;
Bowers v. Lighterage Co., 273 U. S. 346;
United States v. Updike, 281 U. S. 489;
Burnet v. Niagara Falls Brewing Co., ante.

Language used in tax statutes should be read in its ordinary and natural sense.

Helvering v. San Joaquin Co., 297 U. S. 496, 499;
Old Colony R. Co. v. Commissioner, ante.

Congress may well be supposed to have used language in accordance with the common understanding, and words in their known and ordinary signification.

Union Pacific R. Co. v. Hall, 91 U. S. 343, 347;
Old Colony R. Co. v. Commissioner, ante, 560.

The popular or received import of words furnishes the general rule for the interpretation of public laws.

Maillard v. Lawrence, 16 How. 251, 261;
Old Colony R. Co. v. Commissioner, ante;
Woolford Realty Co. v. Rose, 286 U. S. 319, 327;
United States v. Kirby Lumber Co., 284 U. S. 1, 3;

United States v. Buffalo Gas Fuel Co., 172 U. S. 339, 341;
Caminetti v. United States, 242 U. S. 470, 485;
U. S. v. First Nat. Bank, 234 U. S. 245, 258.

Doubt, if there can be any, is not likely to survive a consideration of the mischiefs certain to be engendered by any other ruling.

Woodford Realty Co. v. Rose, ante.

In the interpretation of tax statutes words should be "given their commonly accepted import". Congress may well be supposed to have used language in the popular sense according to common understanding and commercial designation.

United States v. Kirby Lumber Co., ante;
United States v. Buffalo Gas Fuel Co., ante, 341.

As was said in *Lynch v. Alworth-Stephens Co.,* 267 U. S. 364, 370

> "the plain, obvious and rational meaning of a statute, is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

Old Colony R. Co. v. Commissioner, ante.

In seeking the intent of Congress the first consideration is the natural, ordinary and generally understood meaning of the term used.

United States v. Fisher, 2 Cr. 348;
Lake County v. Rollins, 130 U. S. 662;
Maillard v. Lawrence, ante;
United States v. Pacific Ry. Co., 91 U. S. 72.

The meaning of a statute must, in the first instance, be sought in the language in which it is framed, and if that is plain, and admits of no more than one meaning the sole function of the Courts is to enforce it according to its terms, as the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.

Caminetti v. United States, ante;
Lake County v. Rollins, ante, 670, 671;
Hamilton v. Rathbone, 175 U. S. 414, 421.

It is the province of the Court to enforce, not to make the laws; hence the Court is not at liberty to amend the statute or read words into it to make it conform to what the Court may believe to be the spirit of the act or to escape the injustice of law.

Maxwell v. Moore, 22 How. 185;
United States v. Goldenberg, 168 U. S. 95;
Hobbs v. McLean, 117 U. S. 567;
St. Louis v. Taylor, 210 U. S. 281;
United States v. First Nat. Bank, ante, 245, 260;
Caminetti v. U. S., ante.

Where Congress has by apt terms created a class or drawn distinctions between classes of persons (i. e. distiller, producer, etc.) or objects, it is not competent for the Courts to extend or limit the operation of the statute.

United States v. Colorado Co., 157 Fed. 321;
United States v. Goldenberg, ante, 102;
Maxwell v. Moore, ante, 191;
Tiger v. Western Inv. Co., 221 U. S. 286.

A dispute over the meaning of a statute does not of itself show an ambiguity in the Act.

Nor. Pac. Ry. Co. v. Sanders, 47 Fed. 610;
Shreve v. Chusman, 69 Fed. 789;
Webber v. St. Paul City Ry. Co., 97 Fed. 140;
Swartz v. Siegel, 117 Fed. 13.

Subsequent experience is no guide to interpretation.

United States v. Un. Pac. Ry. Co., 91 U. S. 72;
Platt v. Pacific Ry. Co., 99 U. S. 48.

In practical effect, these cases are consolidated on appeal here before this Court for a determination *de novo,* and the decisions of the trial Court below are entitled to no presumption of correctness. The validity of the decisions below depends entirely upon the soundness of the *conclusions of law* drawn by the Court.

II.

THE WINES, UPON WHICH THE TAXES WERE ASSESSED, LEVIED AND COLLECTED, WERE NOT "HELD" BY APPELLANTS ON THE TAXABLE DATE WITHIN THE MEANING OF SECTION 10 (c) OF THE LIQUOR TAXING ACT OF 1934.

Section 10 (c) of the Liquor Taxing Act of 1934, 26 U. S. C. A. § 451 (b), 1934 Cumulative Annual Pocket Part, provides as follows:

"Sec. 10 (c). Upon all wines *held* by the *producer* thereof upon January 12, 1934, *and intended for sale or for use in the manufacture or production of any article intended for sale,* there shall be levied, assessed, collected, and paid a

> floor tax equal to the amount, if any, by which the tax provided for under Section 443 of this title exceeds the tax paid upon the grape brandy or wine spirits used in the fortification of such wine."

which Act by its expressed terms, became effective on the day following the enactment of said Act, namely January 12, 1934.

In view of the Stipulations of Facts, summarized by reference to said Stipulation of Facts and Findings of Facts in the Statements of the Facts herein (ante), a question of law only is presented as to whether appellants "held" the wines within the meaning of Section 10 (c) of the Liquor Taxing Act of 1934.

The District Court concluded in its opinion (R. 37, at 47) " * * * that the liquor in question was 'held' * * * " by appellants " * * * within the meaning of Section 10 (c) on the effective date thereof," in spite of the agreed statement of facts: that appellants did not, on said date, have either the physical possession or custody of the wines; that on said date the wines were not to be used further in the manufacture or production of any article intended for sale; that all wines were not to be used further in the manufacture or production of any article intended for sale; that all wines were in the physical possession of the warehouse corporation in its public bonded warehouse subject to the order of and the future sale by the Bank, as set forth in Uniform Warehouse Receipts, negotiable in form, issued in the name and to

the order of the Bank; and, that said Warehouse Receipts were in the name and in possession of said Bank on said date.

It should be noted in this connection, that the instant tax is imposed only *"upon wines 'held' by the producer thereof upon January 12, 1934"* and not upon wines *"held"* by any other person, including the Bank. Even then, the tax is not imposed upon every producer who "held" the wine on the taxable date, but only upon wines so held and *intended for sale or for use in the manufacture of any article intended for sale.*

Appellants contend that the wines, upon which the taxes were assessed, were not *"held"* by them under any accepted and general meaning of the word *"held"* on the taxable date, or under said Act.

What is the meaning of the word "held"?

"Held" means *owned,* in custody or in possession.

Taylor & Crate v. Asher, 223 Ky. 574, 4 S. W. (2d) 385;

Wey v. Salt Lake City, 35 Utah 504, 101 Pac. 381, 382;

Turner v. Horton, 18 Wyo. 281, 106 Pac. 688.

"As a technical term 'held' embraces two ideas—that of actual possession of some subject of dominion or property, and that of being invested with legal title or right to hold or claim such possession."

"Owned" is the verb tense of *"own",* which means "To possess; to have or hold as property, appurtenance or proprium; to have rightful *title* to, whether

legal or natural; as, to own a house, a *title,* a prerogative."

Webster's New International Dictionary, 1930 Edition.

An "owner" is defined by the same authority as "one who owns; a proprietor; one who has the *legal or rightful title, whether the possessor or not.*"

Stroud's Judicial Dictionary, Second Edition, Volume 2, states that "*'owner'* used in relation to goods, means, every person *who is for the time entitled,* either as *owner* or *agent for the owner,* to the possession of goods."

"Ownership", is defined by *Webster's New International Dictionary,* Second Edition, as "state, relation, or fact of being an owner; lawful claim or *title*; property; proprietorship; dominium."

In fact the District Court below states (R. 45):

> "The word 'held' implies *ownership, McFeely v. Commissioner,* 296 U. S. 102, 107; but does not always imply possession, *Ogle v. Helvering,* 77 F. (2d) 338, 339; *Commissioner v. Nevius,* 76 F. (2d) 109".

Consequently, even the District Court agrees that the word *"held"* implies *ownership.* As above set forth, an "owner" is one who owns and who has the *legal* or *rightful title,* whether the possessor or not.

What better *legal* or *rightful title* could the Bank have than that evidenced by the negotiable warehouse receipts? In view of the California law, all that appellant could have possibly had on the taxable date,

under any stretch of the imagination or law, was an equitable right to have the title to the wine returned to appellant under *first,* an *understanding* when the warehouse receipts were issued, and *later,* under the *written* collateral agreement, executed thereafter, upon the happening of a condition subsequent, **which condition might never occur.**

In holding that "The *title* to the liquor was in plaintiff (appellant), the pledgor" (R. 46), the District Court concedes (R. 37) that if the *title* is in the Bank then appellants would be entitled to recover herein.

In view of the admitted facts and the law the District Court's conclusion (R. 45) that "Here the Bank, the holder of the receipt, could not *properly* demand plaintiff's (appellant's) wine from the warehouseman except under certain conditions set forth in the 'collateral *pledge* agreement' between the plaintiff (appellant) and the Bank", is amazing, to say the least; also, it is contrary to the law enunciated by this Circuit Court of Appeals, the Supreme Court of the United States, and the Supreme Court of the State of California, hereinafter set forth.

The logical conclusion to be drawn from the entire opinion of the District Court is that if the Bank, under the law, had the legal title and the right to demand the wine warehoused by appellant under the Warehouse Receipts issued in the Bank's name and delivered to the Bank, then appellants would have been entitled to recover the taxes, interest and penalties paid (R. 37).

That the Bank, rather than appellants, "*held*" the wine on the taxable date, and that the Bank alone, rather than appellants, had the legal title and the sole right on said date to the possession of said wines, is clearly established by the following authorities.

ANALYSIS OF LAW.

Origin of Section 10 (c).

Section 10 (a)[4] of the Liquor Taxing Act of 1934 was a new section whereas Section 10 (c) was "borrowed" admittedly from the Liquor laws in force in 1918.

Prior to 1918, and until 1933, it was customary for a producer of wine to finance his operations by the issuance of promissory notes secured by the wines in his possession. At that time it was found necessary to establish a more satisfactory method of financing the production of wines in order to insure payment of the notes by unimpaired retention of the security.

Accordingly, on September 16, 1933, pursuant to repeated requests from California wine producers and financiers, Treasury Decision No. 19 (Exhibit "A") was promulgated. Under this decision Public Bonded Storerooms were authorized to be established and to issue warehouse receipts covering commodities stored therein.

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[4]Section 10 (a) of the Liquor Taxing Act of 1934 imposed a floor tax upon *every person* who "held" distilled spirits, intended for sale or for use in the manufacture of any article intended for sale on the taxable date.

According to officials of the Treasury Department, they had expected wine producers, under this plan, to have warehouse receipts issued in their own names and then hypothecate these receipts with the financing agency. Treasury Department officials did not foresee the present situation wherein the title to the wines stored was transferred immediately, upon storage in the warehouse, to the financing agency by means of negotiable warehouse receipts. However, transfer of title to the wines was not prohibited under existing Treasury Decisions, Rules or Regulations.

In the construction of statutes, prior acts may be cited to solve, but not to create an ambiguity.

Hamilton v. Rathbone, ante.

Hence, the repeated reenactment of a statute without substantial change may amount to an implied legislative approval of a construction placed upon it by executive officers.

National Lead Co. v. United States, 252 U. S. 150;

United States v. Farrar, 281 U. S. 624;

Poe v. Seaborn, 282 U. S. 101, 116;

Old Colony R. Co. v. Commissioner, ante, 557.

Intention of Congress must be clearly expressed.

Unless Congress has definitely indicated an intention that the words should be construed otherwise, we must apply them according to their usual acceptation.

Avery v. Commissioner, 292 U. S. 210, 214.

Had Congress intended the Liquor Taxing Act to apply to one having a right under a contract or an

"equity" in the wine for *tax purposes* it would have been a simple matter so to state. Failing to do so it is apparent Congress had no intention to do so.

Maass v. Higgins, 61 S. Ct. 631, 312 U. S. 413, 85 L. Ed. 940, 132 A. L. R. 1035;
United States v. Field, ante, 264;
U. S. v. First National Bank, 234 U. S. 245, 262;
U. S. v. Penn. Co., 1917, 239 Fed. 741.

Moreover, even if Congress so intended, failure to include in the Act the holder of such contract or "equity" right to have title to the wine transferred to him upon certain conditions, prevents a valid imposition upon him of the tax, because tax statutes must be strictly construed.

Estate of Childs; Dwight v. Riley; 18 Cal. (2d) 237, 115 P. (2d) 432.

Had Congress intended to tax such a contract right or "equity", if any existed in the wine, it would have been a simple matter to have so stated but none was expressed in the act under consideration, hence such right or "equity" must be excluded from the tax.

United States v. Field, ante.

The provisions of laws imposing taxes are not to be extended by implication.

Gould v. Gould, ante;
United States v. Field, ante.

It would require language so clear as to leave room for no other reasonable construction in order to induce the belief that Congress intended Section 10 (c) of the Liquor Taxing Act to apply to persons other

than those who "held" the wine in the generally accepted meaning of the term "held".

United States v. Wurts, 303 U. S. 414, 418;
United States v. First National Bank, ante, 258.

What law governs.

The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States, in cases where they apply.

Title 28, *U. S. Code Annotated,* Section 725;
Taney v. Penn. Nat. Bank of Reading (Pa. 1911) 187 F. 691, 109 C. C. A. 437, affirming (D. C. 1910) 176 F. 606 and affirmed (1914), 345 S. Ct. 288, 232 U. S. 174, 58 L. ed. 558.

The legal effect and validity of all transactions, leases, agreements, warehouse receipts, contracts or documents in the instant case, are local and not Federal questions, and depend upon and must be construed and determined in accordance with the laws of the State of California.

Etheridge v. Sperry, 139 U. S. 266, 277;
Taney v. Penn Bank, ante, 180;
Thompson v. Fairbanks, 196 U. S. 516;
Humphrey v. Tatman, 198 U. S. 91;
York Manufacturing Co. v. Cassell, 201 U. S. 344;
Hiscock v. Varick Bank, 206 U. S. 28;
Security Warehousing Co. v. Hand, 206 U. S. 415, 425;
Bryant v. Swofford Bros., 214 U. S. 279.

Interpretation and validity of contracts between plaintiff, warehouseman and Bank.

The language of a contract governs its interpretation.

California Civil Code, Section 1638.

The law and usage of the place where the contract is made governs the contract.

California Civil Code, Sections 1646, 1656.

The object of a contract must be lawful when made.

California Civil Code, Section 1596.

All of the necessary elements of a valid contract are present in connection with all documents executed in the instant case.

California Civil Code, Sections 1550, 1580, 1614, 1667.

Warehouse Receipts Act governs transactions.

Issuance of the warehouse receipts was authorized by the California law.

Warehouse Receipts Act 9039, enacted in 1909, as amended, *Deering's General Laws,* Vol. 3, p. 4975, Sec. 1, Statutes 1909, p. 4673;

Vol. 3, Deering's General Laws, Act 9058, pp. 4974, 4975;

California Civil Code, Secs. 1858-1858f, inc.;

California Agricultural Code, Secs. 1231, et seq.;

Heffron v. Bank of America, N. T. & S. A., (C. C. A. 9th) 113 Fed. (2d) 239, 242.

Warehouse Receipts Act repealed all acts or parts of acts under statutes and laws of California, inconsistent therewith.

Warehouse Receipts Act, ante, Section 60.

The Warehouse Receipts Act of California was intended to achieve uniformity and to effect the secure and ready use of warehouse receipts as instruments of credit. This purpose is inconsistent with the notion that the business world must look to something other than the observance of the definite and comprehensive statements of the Warehouse Receipts Act itself.

Heffron v. Bank of America, N. T. & S. A., ante.

Consequently, warehouse receipts must be distinguished from notes, chattel mortgages, trust receipts, pledges and other types of legal obligations.

Commercial Discount Co. v. Los Angeles County, 100 Cal. Dec. 239.

In this connection, the Court, in *Pattison v. Dale,* 234 U. S. 399 (345 Sup. Ct. 785, 58 L. ed. 1370, 52 L. R. A. (n. s.) 754), at page 405, states:

> "It is insisted that this clearly and unmistakably establishes the doctrine that any transaction designed to give a security in personal property, if not accompanied by an actual change of possession, must be placed in the form of a chattel mortgage and filed for record, in order to be good as against creditors. It seems to us, however, that we should not fail to consider the well-recognized distinction between a chattel mortgage and a pledge. A mortgage of chattels

> imports a present conveyance of the legal title, subject to defeasance upon performance of an express condition subsequent, contained either in the same or in a separate instrument. It may or may not be accomplished by delivery of possession. On the other hand, where title to the property is not presently transferred, but possession only is given with power to sell upon default in the performance of a condition, the transaction is a pledge, and not a mortgage."

In the instant case, under the above decision, as the possession of the wines, as well as the title thereto, was transferred to others, there cannot be a chattel mortgage of the property in question; nor could there be a pledge thereof, the opinion of the District Court to the contrary notwithstanding, in favor of the Bank. The United States Supreme Court, in the above case at page 404, states further:

> "The legal effect of such a transaction depends upon the local law".

Several cases, decided by the Supreme Court of the State of Ohio, are referred to and quotations made therefrom, in the above case, covering the legal effect of a warehouse receipt. In particular, the Court, in this case, refers to the case of *Gibson v. Stevens,* 8 How. 384, 12 L. ed. 1123, in which connection the Court said, at page 408:

> "The citation of Gibson v. Stevens is significant, because in that case this Court in an opinion by Mr. Chief Justice Taney, recognized that where personal property is, from its character or situation, not capable of actual delivery, delivery

of a warehouse receipt or other evidence of title is sufficient to transfer the property and right of possession to another; and also, because this decision was based in large part upon the usages of trade and commerce."

In *Dale v. Pattison,* ante, the Court concluded that the Warehouse Receipts had the effect of transferring from Rohrer to Pattison, the legal title and right to possession of the property covered thereby, for the purposes of the agreement between them.

In considering the legal effect of the issuance of warehouse receipts, negotiable in form, under the laws of the State of Pennsylvania, by a warehouseman who was also the producer of the distilled spirits covered by the warehouse receipts, as between the trustee in bankruptcy of the warehouseman and the Bank to whom warehouse receipts were endorsed and delivered, and which Bank held the receipts under a pledge agreement, the United States Supreme Court in the case of *Taney v. Penn. Nat. Bank,* 232 U. S. 174, 58 L. ed. 558, held that the legal effect of the transaction depended upon the local law; also, among other things, that physical delivery of the property covered by the warehouse receipt, is not essential, in Pennsylvania, to effect a transfer of title and possession to whiskey stored in a bonded distillery warehouse, accompanied by the issuance, conformably to trade usage, of warehouse receipts, negotiable in form, representing such whiskey, which, though stored in the company's own warehouse, is under the control of the Federal Government, and cannot be removed without payment of the internal revenue tax.

In *Central State Bank v. M'Farlin,* 1919, (C. C. A. 8 Cir.), 257 Fed. 535, it was held that the endorsement of warehouse receipts or certificates for grain to a Bank as security, transferred to the Bank the legal title to the grain represented thereby. In that case, certain negotiable warehouse certificates were endorsed by the holder to the Bank as collateral security to certain promissory notes made by the endorser to the Bank. This case quotes, as authorities for its decision, the *Gibson v. Stevens* and *Dale v. Pattison,* cases, cited ante.

Accordingly, under the above decisions, the legal title to the wines stored in the warehouse was in the Bank on the taxable date, regardless of any collateral or other agreements between the parties, the opinion of the District Court below to the contrary notwithstanding.

Warehousing on premises of merchant proposing to pledge his merchandise is effective when done in obedience with legal requirements, and it is immaterial that purpose of warehousing is to enable merchant to finance himself on security of goods by use of warehouse receipts.

Heffron v. Bank of America, N. T. & S. A., ante, p. 242.

The Bank, not plaintiff, was the owner of and entitled to possession of wine taxed.

The warehouse receipts issued herein were and are negotiable.

Warehouse Receipts Act, ante, Section 5;
California Civil Code, Section 1858 b.

Issuance of the warehouse receipts herein to the Bank operated to transfer to the Bank such title as plaintiff had or had the ability to convey to a purchaser in good faith for value.

Warehouse Receipts Act, ante, Sections 41, 42;
California Civil Code, Section 1858 b;
Heffron v. Bank of America, N. T. & S. A., ante;
Union Trust Co. v. Wilson, 1905, 198 U. S. 530.

And the Bank or holder of the warehouse receipt is entitled to the immediate possession of the goods represented by the receipt, and the warehouseman is legally bound to deliver the goods upon a demand made by the Bank or the holder of the receipt.

Warehouse Receipts Act, ante, Section 8;
Cavallaro v. Texas etc. Ry. Co., 110 Cal. 348, 359;
Ex Parte Benjamin Harris & Co., 141 S. C. 430, 140 S. E. 101, 50 A. L. R. 1109.

A Warehouse Receipt is *prima facie* evidence of ownership of the merchandise covered thereby.

Akron Cereal Co. v. First National Bank, 3 Cal. App. 198.

Possession of personal property (i. e. wine or warehouse receipts) is *prima facie* evidence of ownership.

Akron Cereal Co. v. First National Bank, ante.

A holder for value of a negotiable warehouse receipt issued in his name or endorsed to him in conformity with the Uniform Warehouse Receipts Act is the *owner* of the goods represented thereby.

Taney v. Penn. Natl. Bank of Reading, ante;
Shepardson v. Carey, 29 Wisconsin 42.

The placing of property in a room leased to, and kept by, a vendee, pledgee, or warehouseman, accompanied by a continuous display of signs and placards plainly indicating the vendee's, pledgee's or warehouseman's interest, constitute a sufficient change of possession to make the transaction valid.

Hatch v. Standard Oil Co., 100 U. S. 124;
Sumner v. Hamlet, 12 Pick 76;
Union Trust Company v. Wilson, ante;
Heffron v. Bank of America, N. T. & S. A., ante.

And such possession by the warehousemen is a real and not a constructive possession of the goods deposited.

Humphrey v. Tatman, ante.
Thompson v. Fairbanks, ante.

The issuance of a warehouse receipt in the name of the Bank and the delivery thereof to the Bank was a real and not merely a symbolic delivery of the wine to the Bank.

Union Trust Co. v. Wilson, ante.

Consequently, appellant could not set up any right to defeat the pledge of the property by the warehouse company to the Bank in the ordinary course of business, under the Warehouse Receipts Act of California.

California Civil Code, Section 2991.

Transfer of a warehouse receipt in good faith and in the ordinary course of business to the Bank operated to transfer title to the goods covered by the receipt, and transferee acquired not only all rights

of transferor but also the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt, as fully as if warehouseman had contracted directly with him, free of equities between warehouseman and original bailor.

Davis v. Russell, 52 Cal. 611; 28 Am. St. Rep. 647;

Boas v. De Pue Warehouse Co., 69 Cal. App. 246, 249;

See *Warehouses,* 27 R. C. L. 966, Sections 22-27 incl.

Moreover the conveyance or transfer of property was in consideration of a pre-existing indebtedness, hence is a conveyance for a valuable consideration.

Davis v. Russell, ante;

Virginia Etc. Co. v. Glenwood Lumber Co., 5 Cal. App. 256, 261;

Breeze v. International Banking Corp., 25 Cal. App. 437, 450;

Sackett v. Johnson, 54 Cal. 107, 109.

Even creditors of the appellant could not subject the wine in the possession of the warehouse to attachment or execution.

McCullough v. Large, 20 Fed. 309;

Heffron v. Bank of America, N. T. & S. A., ante;

Sinsheimer v. Whitely, 111 Cal. 378, 43 Pac. 1109, 52 Am. St. Rep. 192.

The warehouse had the wine under lock and key in a place to which it had a legal title and right of

access by lease and the right to exclude others; hence had possession of the wine in the fullest sense.

Union Trust Company v. Wilson, ante.

Transactions in good faith and free of fraud.

Under the contract between plaintiff and the Bank, the Bank was given the right not only to take title and deliver the warehouse receipts to its own name, but likewise the right was given to the Bank to transfer unconditionally the wine covered by the warehouse receipts to any person. See Exhibit "M1".

Hiscock v. Varick Bank, ante.

Consequently, insofar as appellees are entitled to be concerned, as there was no bad faith or fraud, it is immaterial whether the transactions between appellant, the Bank and the warehouse company was a pledge, or a secured transaction, or a sale because the Bank exercised the right given to it under the collateral agreement by taking warehouse receipts in its own name as owner thereof.

Security Warehouse Co. v. Hand, ante.

Legal effect of negotiable warehouse receipts issued.

The warehouseman is legally required and bound to deliver the goods covered by the negotiable warehouse receipt upon demand to the holder of the receipt.

Warehouse Receipts Act, ante, Section 8.

Transfer of a negotiable receipt operates to transfer title to the goods covered thereby.

Civil Code of California, 1858 b;

Davis v. Russell, ante.

Endorsement of a negotiable warehouse receipt by the party to whose order it is issued passes the absolute title to the property mentioned thereon to the endorsee.

Bishop v. Fulkerth, 68 Cal. 607.

Even the possession of a negotiable warehouse receipt, indorsed in blank or delivered without indorsement is presumptive evidence of ownership of the goods, *Davis v. Russell,* ante; and such presumption is not rebutted by a showing that the property was originally purchased by the defendants where the receipt, given to their agent in his own name, was afterwards found in the possession of plaintiffs.

Horr v. Barker, 8 Cal. 609.

Ownership of property is established by a warehouse receipt and, hence, presumption that right to present possession followed as a necessary sequence.

Garoutte v. Williamson, 108 Cal. 135.

The party to whom a note is made payable is *prima facie* the owner.

Price v. Dunlap, 5 Cal. 493, 19 Cal. Jur. 1043.

The owner of the wine (the Bank) and the warehouse is, in point of law, in possession of the wine, *U. S. v. Thirty Six Barrels High Wines,* (C. C. N. Y. 1870), 7 Blatchf. 459, 28 Fed. Cas. No. 16,468; and the holder of the warehouse receipt is the owner of the property.

Merchants National Bank v. Roxbury Distilling Co., 196 Fed. 76.

Even mere assignments of warehouse receipts for advances made against goods as security therefor

transfers not only the legal title but also the constructive possession of the property;

Gibson v. Stevens, 8 How. 384, 12 L. ed. 1123;
Dale v. Pattison, ante.

Even under the general law in the absence of statute.

Central State Bank v. M'Farlin, ante;
See also: *Taney v. Penn. Nat. Bank of Reading,* ante.

With the delivery of the receipts to the Bank such delivery of the documentary evidence of title, is held to be a constructive delivery of the goods.

Storey on Sales, Section 311;
Storey on Contracts, Sections 792, 810.

The delivery of bonded warehouse receipts is sufficient to complete a sale of intoxicating liquors without manual delivery of the liquor.

Smuylan v. U. S., (C. C. Ohio, 1923), 293 F. 283.

Treasury decision 19 repealed in part.

Upon the ratification of the 21st amendment to the United States Constitution, the 18th amendment thereto at once became inoperative. Neither the Congress nor the Courts could give it validity. The National Prohibition Act, to the extent that the provisions rested upon the grant of authority to the Congress by the 18th amendment, immediately fell with the withdrawal by the people of the essential constitutional support. Consequently, the requirement

contained in Treasury Decision 19 for incorporation in warehouse receipts of restrictive provisions became inoperative on December 5, 1933, with the ratification of the 21st amendment to the United States Constitution.

United States v. Chambers, 1934, 54 S. Ct. 434, 294 U. S. 217;

Liquor Control Law Service, Federal 2nd Ed., Commerce Clearing House Inc. paragraph IV, Section .02, page 226; Liquor Law Repeal and Enforcement Act, Title I, Section 1, 49 Statute 872.

Bank held title on taxable date.

Moreover, the Bank was authorized to hold Warehouse Receipts, negotiable in form, and title thereunder on the taxable date. Section 30 of the *1931 Regulations 2, United States Treasury Department,* reads as follows:

"Sec. 30. *Warehouse certificates.*—Warehouse certificates covering distilled spirits in Government bonded warehouses may be sold and purchased without the necessity of obtaining permits under these regulations and without involving the seller in special tax liability as a liquor dealer under the internal revenue laws. Ownership of such certificates confers the right of possession in Government bonded warehouses of the distilled spirits covered thereby, but does not confer the right to remove such distilled spirits from bond except for non-beverage purposes under the procedure prescribed in these regulations."

Even appellees admitted in their "Defendants' Closing Brief" filed in the District Court (Page 4, Lines 4-9) that "Insofar as the rights of creditors are concerned that is, bona fide creditors, it must be admitted that the banks did take *title* to the wine. *That has been admitted before* but as between the plaintiffs and purchasers the banks held title to the wine only as security and they held the bare legal *title.*"

Nevertheless, in spite of this frank admission, the District Court below held that the *title* to the liquor was in appellant, without any reservations whatever.

In view of the decision of the United States Supreme Court in *Pattison v. Dale,* ante, and other cases cited, the further conclusion of the District Court below that plaintiff (appellant) was the *pledgor* of the liquor is erroneous and contrary to the facts and the law, because only the title and not the possession of the so-called *"pledged"* property was delivered to the Bank.

Under the above decisions, were it not for the California Uniform Warehouse Receipts Act, this transaction would have been a mortgage of chattels, because under a pledge only the physical property and not the title is delivered to the pledgee, with a power of sale in the event of the occurrence of a condition subsequent. Here the Bank had the title but not the possession of the property. But the Bank did have in addition the *present* right of possession under the negotiable warehouse receipts. Only *if* and when, *if* at all, appellants paid their obligations to

the Banks before the wine was sold or the Warehouse Receipts were negotiated could appellants have had any right or claim to have the wine sold and returned to them. Hence, contrary to the conclusion of the District Court below (R. 46) appellant, had no right on the taxable date, to sue and assert a *title* that appellant did not possess on said date and had no right to possess on said date.

In fact, Section 19 of the *Warehouse Receipts Act,* ante, provides that no right or title of a third person shall be a defense to an action brought by the depositor or a person claiming under him against the warehouseman for failure to deliver the goods according to the terms of the receipt to the Bank.

Here again, the District Court cites, in support of its *"conclusion"* Section 3008 of the *California Civil Code,* which relates solely to *pledges,* and not negotiable Warehouse Receipts, and which Code Section was adopted in 1872, and repealed, to the extent applicable thereunder, by the *California Uniform Warehouse Receipts Act,* adopted in 1909. Likewise, the District Court cites the case of *Akron Cereal Co. v. First National Bank,* 3 Cal. App. 198, 201-2, to support its *"conclusion"* that "The warehouse receipt is only prima facie evidence of ownership" (R. 46), which case was denied in 1906, upon a state of facts that arose in 1900, some nine years before the California Uniform Warehouse Receipts Act changed this rule of law as then enunciated by that Court. Moreover, it appears therein that the warehouse receipts were non-negotiable in form and had been de-

posited as security for a loan as a pledge, whereupon the court made the statement quoted in an action for conversion instituted by the real owner.

Under a state of facts, in *Heffron v. Bank of America, N. T. & S. A.,* ante, similar to the instant cases, except that the Warehouse Receipts issued were non-negotiable, rather than negotiable as herein, this Court, speaking through Circuit Judge Healy, states, in part:

> "As said in the McCaffey case, supra, 'warehousing on the premises of the owner proposing to pledge his merchandise is effective when done in obedience to legal requirements.' It is immaterial that the purpose of the warehousing is to enable the merchant to finance himself on the security of his goods by the use of warehouse receipts. Such is the primary and legitimate objective of modern field warehousing. Union Trust Co. v. Wilson, supra.
>
> (2) The California Warehouse Receipts Act, Deering's General Laws, 1937, Act 9059, enacted in 1909 and several times amended, expressly repeals all acts or parts of acts in conflict with it. We are satisfied that this statute exclusively governs the decision to be made here.
>
> The act defines a warehouseman as 'a person lawfully engaged in the business of storing goods for profit,' section 58, and provides that 'warehouse receipts may be issued by any warehouseman.' Section 1. Non-negotiable as well as negotiable receipts are recognized and protected. The act imposes upon the warehouseman the obligation to deliver the goods to the holder of the warehouse receipts, and he is made liable as

for conversion in case of misdelivery and for damages caused by the non-existence of the goods.

As a condition to the validity and effectiveness of the receipts, the act does not in terms or by implication require notice to be given of the warehousing of the commodities they represent. Nor is notice to creditors of the bailor made a pre-requisite of the issuance, negotiation or transfer of receipts. The act provides (§ 25) that in the case of goods delivered to the warehouseman by the owner, and for which a negotiable receipt is issued, the goods cannot be attached or otherwise levied upon while in the possession of the warehouseman, unless the receipt be first surrendered or its negotiation enjoined.

Of immediate signification here is §42, providing that a person to whom a receipt has been transferred but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor'. By notifying the warehouseman of the transfer to him of a non-negotiable receipt,[3] the holder acquires the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt. 'Prior to the notification of the warehouseman by the transferor or transferee of a non-negotiable receipt, the title of the transferee to the goods and the right to acquire the obligation of the warehouseman may be defeated by the levy

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"[3]Here the Warehouse Company was fully informed of the transfer of the receipts, and all pledged goods in the warehouse were marked to indicate that the receipts were in the hands of the Bank."

of an attachment or execution upon the goods by a creditor of the transferor * * * ' ".

" * * * The statute does more than fix the rights of the holders of warehouse receipts; it circumscribes as well the rights of creditors. In effect it denies to creditors essential rights conferred by the bulk sales law.

The right is unconditionally bestowed on the owner of warehoused goods to convey or pledge his title by a transfer of the warehouse receipt."

" * * * Indeed, the general scheme of the Warehouse Receipts Act to achieve uniformity, and to effect the secure and ready use of warehouse receipts as instruments of credit, is inconsistent with the notion that the business world must look to something other than the observance of the definite and comprehensive terms of the act itself. Compare Jewett v. City Transfer & Storage Co., 128 Cal. App. 556, 18 P. (2d) 351.

We conclude that the Warehouse Receipts Act repealed § 3440 so far as the latter might otherwise apply to warehoused goods."

Even in the case of a conditional sales contract, which differs from a pledge and a chattel mortgage, for reasons herein indicated, and from the warehouse receipt, negotiable in form, because, in the former case, a mere security title only is retained and the possession of the commodity is delivered to the vendee, whereas, in the latter case, title and the right to immediate possession is in the holder of the warehouse receipt, the Court, in the case of *Earle C.*

Anthony, Inc. vs. United States, 57 Ct. Claims, 259, decided that an automobile was not *held* by the vendor *and intended for sale* so as to permit a tax exemption authorized under a tax statute, where the vendee had given to the vendor twelve installment notes in payment, in spite of a reservation of title in the vendor under the contract and a concluding paragraph of the tax statutes exempting articles sold where title is reserved as security. **In the instant case, appellant had not performed that part of the agreement with the Bank on the taxable date that would have authorized appellant to institute an action against the Bank for the recovery of the Warehouse Receipts or the property represented thereby.**

Consequently, appellants contend: that title to the wine, covered by the warehouse receipts issued in the name of and delivered to the Bank prior to the execution of the collateral agreement, referred to by the District Court as the "collateral pledge agreement" (R. 45), was conveyed to and was "held" by the Bank prior to and on the taxable date; that this was true also as to the wine covered by the warehouse receipts issued in the name of and delivered to the Bank after the execution of the collateral agreement; that appellants, on said taxable date, neither owned nor "held" the title, possession, or right to possession of said wine within the meaning of Section 10 (c) of the Liquor Taxing Act of 1934, or at all; that on said taxable date appellants could not have maintained a suit to recover said wine unless they had first paid all sums due the Bank, which had not been done; that

on said taxable date the wine was not held by appellants as a *producer* thereof nor was *it intended for sale or for use in the manufacture of any article intended for sale,* or at all, by appellants; that the only interest or equity that appellants had in said wine was the agreement contained in the collateral agreement to have any surplus proceeds turned over to appellants by the Bank, under their respective agreements, after the sale of the wine by the bank and payment of all expenses in the event of the failure of appellants to pay the Bank all sums due under said agreement by any outstanding note or agreement, and then only in the event the Bank had not already sold the wine as authorized under the agreement; that said warehouse receipts were not transferred to the Bank pursuant to the authority contained in paragraph three of the collateral agreement (R. 66), rather, they were issued, in many cases before the said agreement was even signed, at the request of appellants by the Warehouse Corporation and delivered by said Corporation to the Bank; that, as the word "held" means ownership and title to the wine, the Bank and not appellants "held" the wine on the taxable date, regardless of any rights that may have existed otherwise in favor of appellants, under the collateral agreement on the taxable date.

III

EVEN IF APPELLANTS "HELD" THE WINE ON THE TAXABLE DATE, THE COLLECTION OF THE TAXES THEREON WAS ILLEGAL AND VOID BECAUSE IN VIOLATION OF THE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

Unlike a true excise tax, which imposes a tax upon the doing of an act, Section 10 (c) of the Liquor Taxing Act of 1934, ante, imposed a tax merely upon a *supposed or assumed intention* to do something that might never be done. **Therefore, there is presented to this court the new question as to whether Congress has the power to impose, as an *"excise"*, without apportionment, among the several states, of a tax based upon an *"intention"* to do something in the present or in the future, which intention is frequently unknown, or cannot be ascertained, and may never come to pass.**

Appellants contend, that because Section 10 (c) of the Liquor Taxing Act of 1934 seeks to impose a tax upon a mere "intention", rather than upon the doing of an act, that this Section is in violation of Article I, Section 9, Clause 4, of the United States Constitution, in that it levies a *direct* tax upon the property itself; also, is in violation of Article I, Section 2, Clause 3, of the Constitution of the United States, in that the tax is not "apportioned among the several states which may be included within this Union, according to their respective numbers"; and, because said Section 10 (c) is in violation of the Fifth Amendment of the Constitution of the United States of America, in that it seeks to impose a tax upon one

class of persons only, namely, a particular type and kind of producer of wines, hence, such Act deprives such persons of the equal protection of the laws under the due process clause of the United States Constitution.

Even in the case of *McGoldrick v. Gulf Oil Corporation,* 309 U. S. 430, 84 L. ed. 849, it is to be noted that in exceptional cases, and then only in cases coming from the Federal Courts, this Court can consider questions such as that urged, that the instant tax violates the 5th Amendment of the United States Consitution, by the appellant, and not pressed or passed upon in the Courts below.

Distinction between excise and direct taxes.

Numerous instances of taxes held to be valid excise taxes are available. However, it will be noticed that in all of these cases the tax is imposed upon a particular act or privilege sought to be exercised or done.

In *Knowlton v. Moore,* 1899, 178 U. S. 41, Mr. Justice White, in upholding as a valid excise a tax on legacies and distributive shares under a will, observed the apparent confusion that exists in determining whether a tax is an *excise* or *direct* tax.

On page 77, of this decision, he states:

> "Indeed, the confusion which gives rise to both of the constructions of the statute which we have considered, comes from the want of insight pointed out by Hanson in a passage which we have heretofore quoted; that is, it arises from not keeping in mind the distinction between a

tax on the interest to which some person succeeds on a death, and a tax on the interest which ceased by reason of the death, the two being different objects of taxation".

On page 47, he says:

"Taxes of this character are universally deemed to relate, not to property eo nomine, but to its passage by will or by descent in cases of intestacy, as distinguished from taxes imposed upon property, real or personal, as such, because of its ownership and possession. In other words, the public contribution which death duties exact, is predicated on the passage of property as the result of death, as distinct from a tax on property disassociated from its transmission on receipt by will, or as the result of intestacy". Continuing, Justice White says: "Direct taxes bear immediately upon persons, upon the possession and enjoyment of rights; indirect taxes are levied upon the happening of an event or an exchange".

On page 49, the Court quotes from *Hanson's Death Duties* at page 63:

"What it takes is not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death."

On pages 52 and 53 the Court considers the legal effect of *Pollock v. Farmers' Loan & Trust Company,* 157 U. S. 429, and on rehearing 158 U. S. 601, because included in the income upon which the tax therein considered alleged to be unconstitutional, was imposed, was "money and the value of all personal property acquired by gift or inheritance."

The Court concludes that on the first hearing:

> " * * * it was decided that, to the extent that the income taxes included the rentals from real estate, the tax was a direct tax on the real estate, and was therefore unconstitutional, because not apportioned. Upon the question of whether the unconstitutionality of the tax on income from real estate rendered it legally impossible to enforce all the other taxes provided by the statute, the Court was equally divided in opinion. Ib. 586. On a rehearing (158 U. S. 601) the previous opinion was adhered to, and it was moreover decided that the tax on income from personal property was likewise direct, and that the law imposing such tax was therefore void because not providing for apportionment".

Quoting from page 637 of that decision the court concluded, in substance, from the language used, that the inclusion in income of property acquired by gift or inheritance, (the passing of which could be taxed separately) became invalid because included in one scheme of taxation, the greater part of which was unconstitutional, from which such gift and inheritance property could not be divided.

It is interesting to note that under other revenue statutes, unlike Section 10 (c) of the Liquor Taxing Act of 1934, the tax imposed therein only becomes due when the wine is sold or removed for consumption or sale;

Revenue Act of 1918, Section 611;
Revenue Act of 1918, Section 613;
Internal Revenue Code, Section 3030;

(a) (1) (A), *Act of June 24, 1940,* (Public No. 655, 76th Congress).

or when *used* in the fortification of wine;

Revenue Act of 1918, Section 615;

Act of June 24, 1940, ante, Section 3, amending Section 3031 (a) Internal Revenue Code;

Treasury Decision No. 4994, page 7, Regulations paragraph 309.

or upon *withdrawal* of the wine;

Act of June 24, 1940, ante, Section 3, amending Section 3031 (a) Internal Revenue Code.

and no wine can be *produced* or *received,* and no brandy *withdrawn* for fortification until a proper bond is filed and notice and bond approved;

Title 26, *Code of Federal Regulations,* par. 48 as amended. See also *Treasury Decisions* No. 4994, p. 5.

Also, upon the manufacturing and refining of sugar, *Spreckels Sugar Refining Co. v. McLane,* 48 L. Ed. 496; Upon the manufacture of cheese, *Cornell v. Coyne,* 484 L. Ed. 504; Upon doing business in a corporate capacity, *Flint v. Stone Tracy Co.,* 55 L. Ed. 389; Preparation of tobacco for sale, *Patton v. Brady,* ante; Upon the passing of property; and, upon other uses of property.

As is pointed out in *Pollock v. Farmer's Loan and Trust Company,* 1895, 157 U. S. 429, in the case of *Hylton v. The United States,* (also referred to in *Springer v. United States,* 1880, 102 U. S. 586, hold-

ing a tax on slaves a direct tax) the question whether the tax on carriages was direct or indirect was disputed, but the tax was sustained as a tax on the *use* of the carriages, hence a valid excise tax.

In the case of *Patton v. Brady,* 184 U. S. 608, an "in lieu" tax was enacted increasing an earlier tax imposed upon the manufacture and sale of tobacco, which tax did not become *due* until the manufacture or sale of the tobacco. Hence, the floor tax under consideration in that case increasing a tax not yet *due and payable,* which became *effective* prior to the sale for consumption of the tobacco, in effect was an excise tax upon the doing of an *act* namely, the *sale* for consumption thereafter, although applicable to tobacco then *"held and intended for sale."*

Obviously, this case differs from the instant cases because in the instant cases the tax became *due* forthwith and neither the obligation to pay the tax nor its payment was conditioned upon the doing or the right to do a subsequent *act.*

That this tax was and is a *direct tax* is indicated in *Pollock v. Farmers Loan and Trust Company,* ante. There, it is pointed out that the prima facie definition of direct taxes is that ordinarily all taxes paid primarily by persons who can shift the burden upon someone else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, and the payment of which cannot be avoided, are *direct* taxes.

Under Section 10 (c) of the Liquor Taxing Act of 1934, the producer could not shift the burden of the floor tax to another because the tax was *due* forthwith from *him* although payable later; hence, the producer was under a legal compulsion to pay any tax so due.

As the tax imposed was upon a particular property holder only, (i. e. the producer) upon a specific kind of property or estate only, (i. e. brandy in wine "intended for sale") and which tax could not be avoided, such a tax must, perforce, be a *direct* tax. Not having been apportioned, under the United States Constitution, according to the population, the tax is *void.*

A tax imposed upon the *right to do an act* has been upheld as a valid excise tax, even though it conferred no right to carry on a business if forbidden to be engaged in by the State.

License Tax Cases, 5 Wall. 462.

In *Dawson v. Kentucky Distilleries,* 255 U. S. 288, it was held that a tax upon one of the essential incidents of property is a tax upon property. There an annual license tax upon persons engaged in the business of owning and storing whiskey in bonded warehouses was held to be a tax upon property and not uniform in its operation, even though disguised as an *excise* tax upon the "business" of withdrawing liquor from warehouses.

At page 292, Mr. Justice Brandeis says:

> "The name by which a tax is described in the statute is, of course, immaterial. Its character

must be determined by its incidents; and obviously it has none of the ordinary incidents of an occupation tax."

In the instant cases, as in the *Dawson* case, ante, the tax in question has none of the ordinary incidents of an excise tax. It was neither a tax imposed upon the doing of an act nor a tax upon the right to engage in a business. By express language, the tax was upon specific property, namely, upon all wines held by a certain kind of a producer on a date certain.

Thus far, appellant has been unable to find any tax imposed, other than the instant one, upon a particular group of a class. Rather, excise taxes are imposed upon every *person* doing an act or exercising a privilege that is not basically incident to ownership of property.

Under the *Act of June 24, 1940,* (Public No. 655, 76th Congress) effective July 1, 1940, Section 3030 (a) (1) (A), Internal Revenue Code, the tax "upon all wines" is imposed, as under the statute considered in the *Patton v. Brady* case "when sold or removed for consumption or sale".

Likewise, under the same Act, Section 3031 (a) provides for a credit "whenever brandy or wine spirits shall be lawfully *used* in the fortification of wines", and for assessment of the tax against the producer of wines who has *withdrawn* brandy or wine spirits for *use* in the fortification of wines.

Moreover, "no wine may be *produced* or *received* and no brandy *withdrawn* for fortification until a proper bond is filed and the notice and bond are approved by the district supervisor."

Paragraph 48, Part 178, Title 26, *Code of Federal Regulations;* also see: *Treasury Decisions* 4994, page 5.

Bromley v. McCaughn, 1929, 280 U. S. 124, supports the contention of appellants, despite the fact that there was a strong dissent by Justices Sutherland, Butler and Van Devanter.

In this case a graduated tax "upon the transfer by a resident by gift" of any property during the calendar year was upheld as a valid excise tax.

As the right to transfer by gift is a privilege and the tax was imposed only when the right was exercised, it is conceded that it was a valid excise tax.

Mr. Justice Stone, at page 136, in delivering the majority opinion covering the various cases on "direct taxes", says, in part:

> "that a tax imposed upon a particular *use* of property or the exercise of a single power over property incidental to ownership, is an excise which need not be apportioned * * * ".
>
> "It is a tax laid upon the exercise of a single one of those powers incident to ownership, the power to give the property to another. Under this statute all the other rights and powers which collectively constitute property or ownership may be enjoyed free of the tax."

After considering certain excise tax cases, Mr. Justice Stone says, on page 137, in part:

> "It is true that in each of these cases the tax was imposed upon the exercise of one of the numerous rights of property, but each is clearly distinguishable from a tax which falls upon the owner merely because he is owner, regardless of the use or disposition made of his property."
>
> "It is said that since property is the sum of all rights and powers incident to ownership, if an unapportioned tax on the exercise of any of them is upheld, the distinction between direct and other classes of taxes may be wiped out, since the property itself may likewise be taxed by resort to the expedient of levying numerous taxes upon its uses; that one of the uses of property is to keep it, and that a tax upon the possession or keeping of property is no different than a tax upon the property itself. Even if we assume that a tax levied upon all the uses to which property may be put, or the exercise of a single power indispensable to the enjoyment of all others over it, would be in effect a tax upon property, see Dawson v. Kentucky Distilleries Warehouse Co., 255 U. S. 288, and hence a direct tax requiring apportionment, that is not the case before us."

Yet, in the instant cases, appellees would have the Court believe that the tax in question was a valid excise tax in spite of the fact that the tax is not upon a use but is imposed upon an owner (*held*) regardless of any use or disposition made of his property.

Other cases have held: (1) that a tax upon the amount of sales made by an auctioneer upon goods sold was void, *Cook v. Pennsylvania,* 97 U. S. 566; (2) that a tax on the sale of an article, imported only for sale, is a tax on the article itself, *Brown v. Maryland,* 12 Wheat. 419; and (3) that a tax on income derived from real or personal property is a tax on the property itself, *Pollock v. Farmers Loan & Trust Company,* ante.

Yet, in *Nicol v. Ames,* 173 U. S. 509, it was said that a tax levied upon a sale of property effected at a board of trade or exchange was an excise laid upon the privilege, opportunity or facility afforded by boards of trade or exchanges for the transaction of the business and not upon the property or the sale thereof, which, would be a direct tax and void without apportionment.

As is pointed out by Mr. Justice Day, in *Buchanan v. Warley,* 1917, 245 U. S. 60, at p. 74,

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. *Holden v. Hardy,* 169 U. S. 366, 391. Property consists of the free use, enjoyment and disposal of a person's acquisition without control or diminution save by the law of the land. 1 Blackstone's Commentaries."

Even as the power to tax is the power to destroy, to uphold a tax as an excise which imposes a tax, not upon a use as such, but merely upon a use es-

sential to ownership, would be to uphold a *direct* tax on the property itself.

Counsel for appellants, after reading opposing briefs submitted in the case of *Commonwealth of Pennsylvania v. Fix,* 9 Fed. Supp. 272, can, upon the authority of the same case on appeal, as *Commonwealth of Pennsylvania ex rel. Margrotti v. Kyle,* 79 F. (2d) 520 (certiorari denied by Supreme Court, 297 U. S. 704), state positively that the District Court decision is at best poor dictum, and is not applicable authority herein in support of the conclusion of the District Court below (R. 43).

Not only the facts, but also the legal issues involved and raised, are different therein from the instant cases.

As is clearly pointed out therein by the Circuit Court of Appeals, the only issue involved was whether a taxpayer could enjoin the collection of a federal tax, in the absence of a showing that unless enjoined irreparable damage would result to the taxpayer. Upon the authority of cases cited it was held that collection of the tax could not be enjoined.

It is significant that neither the Circuit Court of Appeals nor the Supreme Court on certiorari considered the question erroneously raised by the District Court as to the validity of the taxes sought to be collected.

A Pennsylvania State Court granted an injunction at the instance of the State of Pennsylvania against

the collection from it as the operator of State liquor stores of certain federal license, floor and other liquor taxes. Thereafter the action was removed to the Federal District Court, and entitled *Commonwealth of Pennsylvania v. Fix,* ante, with the result noted above denying the right of injunction.

In the District Court Pennsylvania contended, in addition to the right to enjoin the collection of the taxes: (1) that in the operation of the liquor stores it was engaged in a governmental, as distinguished from a proprietary, function; and (2) that the floor taxes sought to be collected are unconstitutional and void in that they are direct taxes which have not been apportioned among the several states in the manner required by the Constitution of the United States.

Both of these latter contentions were decided against the State of Pennsylvania for reasons therein set forth.

However, as to the second point above, that the taxes were direct taxes unapportioned as required by the Constitution, the State of Pennsylvania did not distinguish between Sections 10 (a) and 10 (c) of the Liquor Taxing Act of 1934, as do appellants in the instant cases, that Section 10 (c) is special legislation and Section 10 (a) general legislation, nor did the State raise the point that it was not a *producer* of the wines held by it for sale on the taxable date, or that for the reasons set forth by appellants Section 10 (c) was and is a *direct* rather than an *excise* tax.

Moreover, the State *held* the wine on the taxable date whereas in the instant cases the wine was *held* legally by the Bank and the warehouse company.

In the instant case the tax was imposed (Section 10 (c) of the Liquor Taxing Act of 1934):

> "Upon all wines held by the producer thereof upon the day this title takes effect and intended for sale or for use in the manufacture of any article intended for sale, there shall be levied, assessed, collected and paid a floor tax equal to the amount, if any, by which the tax provided for under Section 8 of this title exceeds the tax paid upon the grape brandy or wine spirits used in the fortification of such wine";

Under the above Section, the floor tax imposed was due immediately, but the date of payment of the tax could be extended to a date not exceeding seven months after the effective date of the Act.

Such was not true in *Patton v. Brady,* ante.

The floor tax imposed in the *Patton v. Brady* case was conditioned upon the doing of a prior act, i. e. *a sale,* and did not become due until the *sale* occurred.

In that case an earlier statute imposed a tax of six cents per pound "upon tobacco and snuff *manufactured* and *sold,* or *removed* for consumption or use."

Thereafter Congress increased this tax to twelve cents per pound " * * * however *prepared, manufactured* and *sold,* for consumption or sale * * * " and further provided,

> " * * * there shall also be assessed and collected, * * * upon all articles enumerated in

> this section which were manufactured, imported and removed * * * before passage of this Act * * * , and which articles were at the time of the passage of this act held and intended for sale by *any person,* a tax equal to the difference between the tax already paid on such articles at the time of *removal* from the factory or customhouse and the tax levied upon such articles."

Obviously, both taxes were valid *excises* because their imposition was conditioned upon the doing of acts, to wit: *Preparation, manufacture, sale* and *removal* of the articles upon which the tax was imposed.

Consequently, when the taxpayer *sold* goods, previously removed upon which the tax was paid for removal, after the effective date of the Act, such Act on his part became a taxable transaction, the amount of the tax therefor being determined by the amount of goods removed and sold.

In the instant cases the tax was not imposed upon *"any person"* but only upon a *"producer"* and then only on a particular kind of a producer, i. e. who *held* the wine on the taxable date. The tax imposed became due immediately without any act being done at all. All that the imposition of the tax depended upon was, apparently, that the wine *was intended for sale or for use in* the manufacture of an article intended for sale on the effective date of the Act. On that date one *producer* could say he did not intend to sell or use the wine and another could say he did.

The producer could merely change his unexpressed intention and thereby exempt the brandy in the wine

from the new floor tax because even if he held the wine and did not intend to sell or use it in the manufacture of another article intended for sale, the brandy in the wine became tax free.

Certainly, a tax must be definite, certain and uniform in its operation in order to be valid.

Moreover, all *persons,* who held the same kind of wine manufactured out of similar commodities and under similar conditions, were not obliged to pay the so-called "equalizing floor tax".

The attention of this Court is directed to the fact that in all of the cases cited, the *"excise"* tax is imposed upon the doing of an act, the happening of some event, or upon the exercise of a right to do a certain act; whereas in the present case the tax is upon *wine held by the producer and "intended" for sale or for use in the manufacture of an article intended for sale,* rather than upon the doing of an act, the happening of an event, or the exercise of a right to do an act.

Congress has, under this statute, stretched the already elastic construction of an *excise* tax to include a new field, namely, the taxing of property, *if* the owner of property has an "intent" to do anything at all with it. **If the tax were upon the wine, and that portion of the Liquor Taxing Act of 1934, relating to the** *intent to sell,* **were omitted, it is apparent, under the authority of** *Pollock v. Farmers Loan & Trust Company,* **ante, that this would be a** *direct* **tax upon personal property.** In the *Pollock* case,

the Court pointed out that it has consistently held, almost from the foundation of the government, that a tax imposed upon the particular use of property, or the exercise of a single power over property incidental to ownership, is an *excise* tax, which need not be apportioned. However, where the tax was imposed upon the income of the property, the receipt of which was a basic incident of ownership of the property itself, such a tax was held to be a direct tax, which must be apportioned.

The question therefore resolves itself into the inquiry as to whether Congress, by adding to what would otherwise be a direct tax upon the wine itself, the further and additional element of an intent to do something with the property, which intent may never be realized or consummated, can convert the direct tax into an excise tax. Appellants contend that Congress has the power to exercise only those powers delegated to it expressly under the Constitution of the United States, and, that it cannot do indirectly that which it is prohibited from doing directly, namely, imposing, ostensibly as an excise tax, a tax which is in reality a direct tax upon the property itself, because the right to have an *"intention"* to do something with property is an incident to the ownership of the property, as distinguished from doing something with the property.

Inasmuch as appellees concede, in their closing brief filed in the District Court below on page 21, lines 8 to 11 inclusive, that "if the tax imposed by Section 10 (c) were a direct tax then it admittedly

would have to be apportioned, admittedly it was not apportioned, and therefore would be unconstitutional", appellants do not deem it necessary to submit further authorities in this connection at this time.

CONCLUSION.

On the basis of the facts, which are undisputed, and the decisions determining the legal provisions in question, as well as the common sense of the situation, appellants submit that the decision and judgment of the trial court was erroneous in the particulars noted in the Specification of Errors and should be reversed and remanded to the District Court, with instructions to enter Findings of Fact and Conclusions of Law in accordance with the agreed statement of facts and the law governing the issues involved, issuing thereafter a judgment in conformity therewith, and a certificate of probable cause in those cases in which the United States of America has been properly dismissed as a party defendant.

Dated, San Francisco,
October 19, 1942.

Respectfully submitted,
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Attorney for Appellants.